Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 901

GERALD STANLEY SHERMAN and
RICHARD HENRY HOLLAND,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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The petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on February 22, 1971, and (2) granting the petition. As grounds for this motion, petitioners state the following:

Petitioners confine this petition to only one of the ten questions raised in their petition for writ of certiorari, namely, question 6, reading as follows:

> "6. Whether, assuming the existence of probable cause, the warrantless search and seizure of the marijuana from the locked trunk of the car, in the absence of exigent circumstances, deprived petitioners of their Fourth Amendment right against unreasonable search and seizure."

There are two decisions by the Ninth Circuit Court of Appeals (these were by two separate panels of that Court, different in each case from the panel which affirmed the judgment below), *United States* v. *Payne*, 429 F. 2d 169 (1970), and *Barrentine* v. *United States* (1970), 434 F. 2d 636, which, in similar circumstances, appear to have decided the identical above-stated question as petitioners contend. Neither *Payne* nor *Barrentine* was cited in our petition for the writ, because they were published after our petition was completed.

In our case, the government agents had all the probable cause they ever obtained by 1:15 a.m. on the morning of October 1, 1968. They knew that the car was immobilized at the Motel for the night, that petitioners had retired and were not to be called until 9 a.m. By 1:15 a.m. the agents had made up their minds to stop the car on the road promptly after it left in the morning, and they discontinued their surveillance at 4 a.m., and went home.

The petitioners drove off shortly after 9:15 a.m. that morning, the agents stopped the car alongside the road four miles away and searched the interior and glove compartment. Shortly thereafter they took the car to a nearby gas station and opened and searched the locked car trunk. Only then, after finding marijuana in the car trunk, were petitioners arrested.

The agents had over eight hours to apply for a warrant. But they had no intention of securing a warrant; they

had decided at 1:15 a.m. to stop the car on the road when it left in the morning and to search it without benefit of warrant.

The refusal to suppress the fruits of this search seems to run counter to all the strictures of this Court that, absent exigent circumstances, a warrant is not a matter of choice, nor even the better practice but is a constitutional requirement, a "must", *Chambers* v. *Maroney*, (1970), 399 U.S. 42, and that the seeming appearance of exigent circumstances, i.e. a moving car, occasioned by the agents themselves, may not substitute for the warrant. *Chimel* v. *California* (1969), 395 U.S. 752.

In *Payne*, supra, the Ninth Circuit Court of Appeals (by a panel different from the one at bar) said, apropos of a situation akin to that at bar:

> "Finally, the Government contends that the search of an automobile is not subject to the same rules as the search of an office, home or other immovable structure. Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); Brinegar v. United States, 338 U.S. 160, 69 S. Ct., 1302, 93 L. Ed. 1879 (1949). While it is true that the Supreme Court has enunciated slightly different rules concerning a search of an automobile without a warrant, the rationale is apparently based upon the fact that a 'vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' Chimel v. California, 395 U.S. 752, 764, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685 (1969). In the instant case the search of the Volkswagen cannot be justified upon this reasoning. There is no indication in the record that the appellant or any of his party were preparing to leave, and quite to the contrary *it is clear that appellant was bedding*

> *down for the evening and that there was ample time to secure the necessary warrant for the search of the car had Ranger Wolfe believed there was probable cause to seek one.*" (italics supplied).

In *Barrentine*, supra, in the absence of exigent circumstances, the Ninth Circuit Court of Appeals, (again, by a panel different from the one at bar) condemned the warrantless search of a car trunk, relying for its decision on *Chambers* v. *Maroney* (1970), 399 U.S. 42.

These decisions of the Ninth Circuit are based on an unbroken line of decisions in this Court and support our argument that only a *grave emergency* (as *Chimel* v. *California* (1969), 395 U.S. 752, termed it, in quoting from *McDonald* v. *United States* (1948), 335 U.S. 451 at 455) justifies a warrantless seizure and search, even of a car. See *Preston* v. *United States* (1964), 376 U.S. 364.

At bar, both time and circumstance permitted the obtaining of a search warrant or, at the very least, an effort to apply for one. The agents' callous disregard of that constitutional requirement, if allowed to stand, will serve only to encourage their continued lawless law enforcement.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

WILLIAM T. GRIFFIN,
Counsel for Petitioners.

March 15th, 1971

Certificate of Counsel

As counsel for petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

WILLIAM T. GRIFFIN,
Counsel for Petitioners

Certificate of Service

I hereby certify that on this 15th day of March, 1971, three copies of the above Petition for Rehearing were mailed, postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530, as counsel for the United States, the only other party to the appeal. Dated: New York, March 15th, 1971.

WILLIAM T. GRIFFIN,
Counsel for Petitioners